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No. 20544

In the

United States Court of Appeals

For the Ninth Circuit

STOCKTON PORT DISTRICT,
Petitioner,

vs.

FEDERAL MARITIME COMMISSION AND UNITED STATES OF AMERICA,
Respondents.

Reply Brief of Petitioner Stockton Port District

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TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED

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I.

INTRODUCTION

The Brief of Intervenors Pacific Westbound Conference and Its Member Lines states:

> "The Commission and the Examiner both concluded * * * that areas naturally tributary to Stockton are equally so to, and can be naturally served at, San Francisco and the other ports within the same geographical area. * * *" (PWC Brief 6.)*

*Throughout this Brief all emphasis in quotations is supplied unless otherwise stated.

This points up very clearly the fallacy in the decision of the Federal Maritime Commission under consideration and in the position of the respondents and their supporting intervenors.

If the San Joaquin Valley area, which is naturally tributary to the Port of Stockton, can, as our opponents contend, be also served "naturally" at San Francisco, then there is no need for the artificial device of port equalization in order to influence the movement of the cargo via San Francisco instead of Stockton. Of course the truth of the matter—and the basis of our complaint—is that the area that is naturally tributary to Stockton because of lower inland transportation rates cannot be served "naturally" at San Francisco, but requires the artificial device of port equalization in order to be served at San Francisco.

Our complaint is directed to the unfair and artificial means of port equalization which is employed by the intervenor ocean carriers in order to influence the movement of this cargo via San Francisco and thus deprive the Port of Stockton of freight which would naturally pass through Stockton except for such equalization.

The briefs of the respondents and their supporting intervenors do not meet the issues that we have raised, but attempt to divert attention away from the real issues by expounding on such irrelevant matters as whether Stockton is a San Francisco Bay Harbor Complex port (whatever that is), whether Stockton is in the same "geographical area" as San Francisco, whether the area that is "naturally tributary" to Stockton is also "naturally tributary" to San Francisco, and the so-called "transportation economies" involved in moving the cargo in question via San Francisco instead of Stockton.

We shall refer to the various issues mentioned in our Opening Brief and will show that the briefs of the respond-

ents and their intervenors do not meet the arguments that we have advanced under the respective issues.

II.

SECTION 8 OF MERCHANT MARINE ACT, 1920

In and by Section 8 of the Merchant Marine Act, 1920, (46 U.S.C. 867), Congress has declared that "the use by vessels of ports adequate to care for the freight which would naturally pass through such ports" shall be promoted and encouraged.* Congress has thus determined that such action is in the public interest.

The Federal Maritime Board recognized its duty in this respect in the case of *City of Portland v. Pacific Westbound Conference,* 4 F.M.B. 664 (1955), in the following language:

> "Section 8 charges the Board with the duty to promote and encourage the use by vessels of ports adequate to care for the freight which would naturally pass through such ports." (4 F.M.B. 679.)

In the *City of Portland* case the Board likewise held that Section 8 requires as follows:

> "* * * That section requires, all other factors being substantially equal, that a given geographical area and its ports should receive the benefits of or be subject to the burdens naturally incident to its proximity to another geographical area.* * *" (4 F.M.B. 679.)

In upholding the Board's decision in the *City of Portland* case, the United States Court of Appeals held with respect to Section 8 in *Pacific Far East Line v. United States,* 246 F. (2d) 711 (C.A., D.C., 1957):

> "* * * That policy having been expressed, the Board could, if it was not bound to do so, examine the practices complained of in the light of that policy, and

*The statutes relied upon by petitioner are set forth in Appendix B of its Opening Brief.

> exercise its power to approve or disapprove such practices accordingly. * * *" (246 F. (2d) 716.)

Section 8 of the Merchant Marine Act, 1920, is the law of the land, and the policy of Congress expressed therein must be followed by the Federal Maritime Commission, as well as having been followed by the Federal Maritime Board.*

As we pointed out in our Opening Brief (pages 5, 15-16), 47,529 tons of cargo were equalized by the respondent Conference lines against the Port of Stockton in 1962, and of that amount 46,129 tons moved over ports located on San Francisco Bay. (Ex. 11-14.) The Commission has found that "Without equalization much of the cargo would move through Stockton". (Com. Rep. 7-8, R. 1272-73.) The reason for this is that the inland transportation rates are lower to the Port of Stockton from the area involved—namely the San Joaquin Valley—than to any other port. (Rep. Tr. 731, Rollins; Ex. 4, 10, 30, 32, 33, 34.)

Except for the artificial device of port equalization, therefore, in the language of Section 8 the freight in question "would naturally pass through" the Port of Stockton.

The Commission therefore is required to comply with its duty to enforce the Congressional policy expressed in Section 8—namely to prohibit the port equalization which prevents freight that would naturally pass through the Port of Stockton from doing so.

But our opponents set forth various arguments in an unconvincing effort to show that Section 8 does not compel such a result.

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*A comparison of Reorganization Plan No. 51 of 1950 and Reorganization Plan No. 7 of 1961 shows that the powers granted to the Federal Maritime Board and the Federal Maritime Commission were the same. (See 46 U.S.C.A. 1111 note.)

They contend that the Commission considered Section 8, but concluded that there were other factors that outweighed the policy expressed by Congress in Section 8—such as "transportation economics", including the interests of shippers, carriers desiring to equalize, and other ports. But Congress has expressed the policy which it desires to have followed, and it did not leave room for the Commission to determine whether it disagreed with Congress. As the Board said in the *City of Portland* case, (supra, page 3), Section 8 created a duty and a requirement for the Commission to follow. In the case of *Pacific Far East Line v. United States,* supra, in upholding the decision of the Board in the *City of Portland* case the United States Court of Appeals intimated that the Board should examine equalization practices in the light of the Congressional policy expressed in Section 8 and should exercise its power to approve or disapprove such practices "accordingly"—that is, on the basis of whether the equalization practices produced results contrary to the policy expressed by Congress in Section 8. Since the equalization practices here involved divert from the Port of Stockton cargo which would otherwise naturally pass through that port, such practices are clearly in violation of the Congressional policy expressed in Section 8, and the Commission should therefore have performed its duty to require the discontinuance of such equalization practices.

Our opponents likewise argue that the policy expressed in Section 8 is inapplicable here because the Port of Stockton and the ports on San Francisco Bay are in the same "geographical area" and the area that is naturally tributary to the Port of Stockton is also naturally tributary to San Francisco and other ports located on San Francisco

Bay. There is nothing in Section 8 making the policy expressed therein inapplicable when ports in the same geographical area are involved. With respect to "naturally tributary" territory, the question under Section 8 is through which port the freight in question would "naturally pass"—that is, in the absence of artificial devices such as port equalization. Here the Commission has found that such freight would pass through the Port of Stockton. The Congressional policy expressed in Section 8 is therefore clearly applicable to the present situation.

By its policy expressed in Section 8, Congress has determined that it is in the public interest to promote and encourage the use by vessels of ports for freight which would naturally pass through such ports. Since the Commission has found that without equalization much of the equalized cargo would move through the Port of Stockton (Com. Rep. 7-8, R. 1272-73), and since the port equalization rules and practices divert such cargo away from Stockton, Section 8 requires the Commission to comply with the Congressional policy by ordering the discontinuance of such equalization rules and practices.

The Commission should have exercised its power under the Shipping Act, 1916, by ordering the discontinuance of the port equalization rules and practices here involved on the ground that they violate the Congressional policy expressed in Section 8 of the Merchant Marine Act, 1920, and hence are unjustly discriminatory between ports and contrary to the public interest, in violation of Section 15 of the Shipping Act, and unduly preferential and prejudicial between ports, in violation of Section 16(First) of the Shipping Act.

III.

SECTION 205 OF MERCHANT MARINE ACT, 1936

In their replies to our argument pertaining to Section 205 of the Merchant Marine Act, 1936, (46 U.S.C. 1115), (our Opening Brief, 22-23), the respondents and their supporting intervenors simply refuse to recognize that the Commission has made the following finding of fact in its Report:

> "* * * Although equalization is optional under the tariff, carriers find that competition compels them to equalize." (Com. Rep. 8, R. 1273.)

Since competition compels carriers to equalize, this obviously produces the result that a Conference carrier whose managerial judgment would lead it to serve the Port of Stockton by sending its vessel to Stockton to load cargo, is compelled by the competitive equalization practices of other Conference carriers to refrain from sending its vessel to Stockton and instead to equalize the cargo via another port, such as San Francisco.

The equalization rule, and the practice of the Conference members thereunder, have thus prevented the carrier in question from serving Stockton. This is a clear violation of Section 205.

IV.

UNLAWFUL REBATES

The respondents and their intervenors argue that here there cannot be any unlawful rebates under Section 16 (Second) of the Shipping Act, 1916, (46 U.S.C. 815), because, they claim, under that section the reduced rates must result in a situation where there is some sort of concealment or misrepresentation and here everything was set forth in the tariff.

The Commission found that if there were no equalization some of the cargo in question would still have moved via San Francisco without any payment by the ocean carrier of any part of the shipper's inland transportation charges. (Com. Rep. 8, 14 R. 1273, 1279.) (See our Opening Brief, 24.) The payment of part of the shipper's inland transportation charges is, as we stated in our Opening Brief (page 24), a purely unnecessary gratuitous rebate—an unjust and unfair device which enables the shipper to obtain transportation at less than the regular rates or charges. Compare *Investigation of Storage Practices of Pacific Far East Line, Inc., et al.*, 6 F.M.B. 301 (1961), which is cited on page 25 of our Opening Brief.

Even if some form of concealment or misrepresentation were required under Section 16(Second), it is readily present in this situation. The tariff of the respondent Conferences which was involved in the hearing before the Commission allowed equalization only under the following circumstances:

> "* * * cargo which would normally move from one California terminal port, may be shipped under equalization via another California terminal port." (See paragraph (e) of Appendix A of our Opening Brief.)

When equalization payments were made on cargo which would have moved over San Francisco without any equalization, there has been a payment by the ocean carrier of part of the shipper's inland transportation charge in violation of the tariff, since the cargo in question would not normally have moved over Stockton. This is clearly the kind of concealment or misrepresentation which our opponents contend is required in order to constitute an unlawful rebate under Section 16(Second).

V.

UNJUST DISCRIMINATION AGAINST PORT OF STOCKTON

We have shown that there is unjust discrimination and undue prejudice against the Port of Stockton because the equalization rules and practices violate the Congressional policy expressed in Section 8 of the Merchant Marine Act, 1920. But there is unjust discrimination and undue prejudice against Stockton on another ground, which will be discussed next.

As we pointed out in our Opening Brief, the Commission found that port equalization resulted in unjust discrimination against the Port of Stockton in the case of cargo equalized against Stockton which was loaded at Los Angeles or Long Beach. The Commission found that there was no unjust discrimination against Stockton, however, when the same cargo was equalized against Stockton and loaded at San Francisco or any other port located on San Francisco Bay. The reason for this difference in treatment was that the Commission found that the Port of Stockton was a San Francisco Bay area port and hence Stockton and San Francisco were in the same "geographical area", and that the area naturally tributary to Stockton was also "naturally" tributary to San Francisco.

The Brief of the Pacific Westbound Conference refers continually to "San Francisco Bay Harbor Complex Ports". The Commission did not make any finding with respect to any "harbor complex"—whatever that term means. The Examiner used the term "harbor complex", but the Examiner's Initial Decision is not part of the Commission's Report. In its Report the Commission approved some of the Examiner's conclusions, but it did not adopt his Initial Decision as its decision. Consequently, the Examiner's Initial Decision cannot be used to support findings

or conclusions in the Commission's Report, and the quotations from the Initial Decision which are set forth in the Brief of the Pacific Westbound Conference are out of order and improper.

The briefs of the respondents and their supporting intervenors endeavor to make great capital of the fact that the Commission found that Stockton and San Francisco are in the same geographical area and that the area naturally tributary to Stockton is also naturally tributary to San Francisco. They have not advanced any contentions in this respect which we have not met fully at pages 25 to 45 of our Opening Brief. We showed there in considerable detail that there is no substantial "evidence" to support these findings, and that even if such findings were correct, they would not be a proper ground for differentiating between the Los Angeles and San Francisco situations and for concluding that there is no unjust discrimination against the Port of Stockton when the cargo is loaded at San Francisco, even though there is unjust discrimination when it is loaded at Los Angeles or Long Beach.

The respondents and their intervenors also rely heavily on economic factors in an attempt to defeat our claim of unjust discrimination and undue prejudice against the Port of Stockton. But the Commission itself has rejected economic considerations as a ground for determining whether there is unjust discrimination. In this connection the Commission concluded:

> "* * * Thus, there is ample economic and cost justification for the discrimination against Stockton such as it is. But even this would not save respondents' equalization under the applicable precedents were it established that the practice drew cargo away from territory which was exclusively and naturally tributary to Stockton." (Com. Rep. 14, R. 1279.)

In considering the question of unjust discrimination, however, the Commission became confused in dealing with various terms, such as "naturally tributary", "natural direction of the flow of traffic", and "right to the traffic".

In finding unjust discrimination against Stockton resulting from equalization against that port when the cargo was loaded at Los Angeles or Long Beach, the Commission concluded that since the inland transportation costs were lower to Stockton than to Los Angeles or Long Beach, the area in which the traffic originated (the San Joaquin Valley) was "naturally tributary" to Stockton, and that consequently Stockton had a right to the traffic. The Commission concluded further that since the equalization destroyed this right it was unduly prejudicial to Stockton. (Com. Rep. 26, R. 1291.) That is the sense in which the terms "naturally tributary" and "right to the traffic" have been used in prior decisions. (See the quotations cited on pages 35, 38 and 39 of our Opening Brief from *City of Portland v. Pacific Westbound Conference,* 4 F.M.B. 664, 674-675; *City of Mobile v. Baltimore Insular Line, Inc.,* 2 U.S.M.C. 474, 486; *Beaumont Port Commission v. Seatrain Lines, Inc.,* 3 F.M.B. 556, 566.) In other words, in the case of cargo loaded at Los Angeles or Long Beach the Commission held that each port should stand on its own natural footing, and that cargo cannot be diverted from a port by the artificial device of port equalization.

The Commission proceeded to reverse its own conclusion when comparing San Francisco and Stockton. Even though inland transportation costs are lower to Stockton than to San Francisco from the San Joaquin Valley (a necessary ingredient for equalization and also a clear definition of naturally tributary territory), the Commission stated that the reverse of the Los Angeles/Long Beach conclusion was the correct approach.

The inland transportation costs from the San Joaquin Valley are lower to Stockton than to either San Francisco or Los Angeles and hence that area is naturally tributary to Stockton in both instances. The Commission should have concluded that since equalization destroyed Stockton's right to this traffic and Stockton was unduly prejudiced thereby when equalized over Los Angeles, the same undue prejudice existed when cargo from this origin area was equalized over San Francisco.

When the question is unjust discrimination and undue prejudice against Stockton in the case of the same cargo equalized against Stockton and loaded at San Francisco, the Commission has improperly applied a different meaning to the terms "naturally tributary" and "right to the traffic". Through some strange use of the term "naturally tributary", the Commission has concluded that the area which is naturally tributary to Stockton is also "naturally" tributary to San Francisco and that hence Stockton has no right to the traffic in question.

We have shown the invalidity of the Commission's position at pages 25 to 45 of our Opening Brief. We merely desire to remind the Court again of something that is wholly obvious. There can never be port equalization in a situation where the cargo is "naturally" tributary to the port at which the cargo is loaded, because the whole function and meaning of port equalization is an artificial device to divert the traffic away from the port over which it would naturally move and to force its movement over another port over which it would not move but for the equalization. The cargo thus cannot possibly be said to be naturally tributary to the forced loading port.

With respect to the proper meaning of the term "natural direction of the flow of traffic", the dissenting opinion of Commissioner Hearn has correctly described the situation as follows:

"Secondly, to say, as does the majority, that the 'natural direction of the flow of traffic from the San Joaquin Valley . . . is through the Golden Gate to the Pacific Ocean' begs the question. The point at issue is whether the 'natural direction of the flow of traffic from the San Joaquin Valley . . . through the Golden Gate . . .' is through San Francisco or through Stockton. I hold to the belief that this natural flow is through Stockton, and succinctly stated, but for the equalization, an admittedly artificial device, San Joaquin exports would normally flow through the Golden Gate via Stockton * * *." (Com. Rep. 31, R. 1297.)

Perhaps we should reply briefly to the Pacific Westbound Conference's objection to our "incredible assertion" that "the Commission has not made any finding that port equalization on cargo loaded at San Francisco is justified by inadequacy of service at Stockton". (See PWC Brief 23 and our Opening Brief 41.) The only mention of this matter in the Commission's Report is as follows, which confirms the statements at page 41 of our Opening Brief:

"Service is unquestionably adequate at San Francisco. However, adequacy of service at Stockton is dependent upon the needs of particular shippers. Some shippers consider the Stockton service inadequate to meet overseas commitments." (Com. Rep. 8, R. 1273.)

The dissenting opinion of Commissioner Hearn has correctly set forth the legal principles applicable in determining the issue of unjust discrimination and undue prejudice against the Port of Stockton, in the following language:

"The only valid test, in this case, for determining whether or not the effectuation of the equalization rule, and consequently for determining whether respondents are giving 'any undue or unreasonable preference or advantage to any particular person, locality, or des-

> cription of traffic' or subjecting 'any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage' in violation of Section 16(First), is whether the traffic would move via San Francisco but for the equalization. Here, certainly, most of it would not and to the extent that the artificial device draws traffic from Stockton it is unlawful." (Com. Rep. 32, R. 1298. Underscoring in text.)

The Commission's conclusion that the equalization rules and practices are not unjustly discriminatory or unduly prejudicial against the Port of Stockton on cargo loaded at San Francisco or any other port on San Francisco Bay should be set aside by the Court because such conclusion is based on findings unsupported by substantial evidence and a failure to apply the correct principles of law.

VI.

SCOPE OF JUDICIAL REVIEW

The Brief of the Pacific Westbound Conference contends that the points that we have raised are not within the scope of proper judicial review, and that we are merely asking the Court to substitute its views on the facts for those of the Commission.

That this point is wholly without merit is apparent from the fact that the Federal Maritime Commission, which is continually involved in petitions for judicial review of its orders, does not even raise the point in its Brief.

The contentions that we have advanced are directed toward errors of law—improper construction of statutes or failure to apply statutes properly, lack of substantial evidence to support Commission findings, and absence of proper findings to support conclusions. These are all proper matters for judicial review.

VII.

CONCLUSION

Other points raised in the opposing briefs are adequately covered in our Opening Brief.

Once again we desire to direct the Court's attention to Commissioner Hearn's dissenting opinion (Com. Rep. 27A-33, R. 1293-99) for a correct statement of the principles of law on the various points which the majority of the Commission decided erroneously.

Our position is not that the Port of Stockton has an inalienable right to any particular cargo, but that Stockton should have the right to compete for any cargo without the added burden of an artificial barrier imposed by ocean carriers which deprives Stockton of this right to compete on a natural basis.

The Port of Stockton is entitled to have all ports compete for cargo on the basis of their respective natural advantages and disadvantages, free from artificial devices, such as port equalization, which divert from Stockton to a competing port cargo which would otherwise move over Stockton. This is in accordance with the Congressional policy expressed in Section 8 of the Merchant Marine Act, 1920, and with proper legal principles pertaining to unjust discrimination and undue prejudice.

The Commission's order should be set aside to the extent, and on the grounds, sets forth in our Opening Brief.

Respectfully submitted,

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Dated: September 12, 1966

CERTIFICATE OF COUNSEL AND OF SERVICE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

I further certify that I have this day served the foregoing document upon all parties of record in this proceeding by mailing, by air mail, postage prepaid, three copies to Walter H. Mayo III, attorney for the respondents, and one copy to Irwin A. Seibel, Attorney, Department of Justice, and by mailing a copy thereof, by regular first-class mail, postage prepaid, to Edward D. Ransom, attorney for interveners Pacific Westbound Conference and its members, Leonard G. James, attorney for interveners Pacific Straits Conference and Pacific/Indonesian Conference and their members, and Miss Miriam E. Wolff, attorney for intervener San Francisco Port Authority.

Dated at San Francisco, California, September 12, 1966.

J. Richard Townsend
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